No. 1165

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In the Supreme Court of the United States

WILLIAM A. EUBANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Illinois

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 17, 1971, and (2) granting the petition. As grounds for this motion, petitioner states the following:

THE GRANT OF CERTIORARI IN KIRBY v. ILLINOIS, No. 6401, OCT. TERM 1970.

On May 24, 1971, a few days after the denial of certiorari in the instant case, this Court granted certiorari in *Kirby* v. *Illinois,* No. 6401, Oct. Term, 1970, limited to the ques-

tion of "whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred."

In the case at bar, *seven months after the robbery,* state police took the victim to the federal building in Chicago to identify petitioner who was seated alone and without counsel on a courtroom bench. Petitioner was apparently unaware of the surreptitious, prearranged identification.

Under the interpretation given *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), by the Illinois state courts, from which both *Kirby* and the instant case arise, the right to counsel at a showup does not exist prior to indictment. *People* v. *Cesarz,* 44 Ill. 2d 180 (1969); *People* v. *Palmer,* 41 Ill. 2d 571 (1969). The examination of this interpretation, which will necessarily be made by this Court in its consideration of *Kirby,* properly involves the same basic issues raised by the instant case. At what point in the criminal process, from crime to trial, does the right to counsel for showups arise? May the prosecution by delaying the step of indictment—or of formal accusation—effectively deny the right to counsel? Is the need for the advice, protection and memory of counsel greater prior to indictment, let alone formal arrest when the defendant has no notice and less cause to identify and later to remember at trial the circumstances of the showup?

In most basic respects the facts of *Kirby* and the instant case are similar: in neither had the defendant been indicted at the time of the showup; in both a period of time (more than 48 hours in *Kirby;* more than seven months in the instant case) had elapsed since the alleged crime;

in both the showup was arranged by the prosecution rather than being a chance meeting between defendant and witness. The pre-arrest/post-arrest distinction, which does exist between *Kirby* and the instant case,* is a question of the point in the criminal process at which the right to counsel arises; both cases, however, call into question the Illinois rule holding that the operative point is the time of indictment.

In *Kirby,* this Court will hear and consider whether the right to counsel exists before the fact of indictment. The Court should, at the same time, hear and consider the instant case to determine the question, which is a necessary corollary of *Kirby,* of *how far* before indictment the right exists.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

THOMAS P. SULLIVAN
DOUGLAS C. NOHLGREN
Counsel for Petitioner

June 11, 1971

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* The record in this case is unclear as to whether or not defendant was under *federal* arrest at the time of the showup. It is clear, however, that he was not then under *state* arrest.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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Counsel for Petitioner